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STATUTES

COURT RULES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS

RESPONSE OF G. M. MC WILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS, TO PETITION FOR WRIT OF CERTIORARI OF MRS. JOHN B. EDMONSON.

The respondent respectfully represents and shows to the court:

I

Objections to Sufficiency of Petition and Record for Writ of Certiorari

1. The petition does not conform to the requirements of Rule 38:

(a) In that under said rule a certiorari petition "shall be accompanied by a certified transcript of the record in the

case." Only a part of the record has been filed in this Court, there having been certified only the printed part of the record which is substantially less than the whole record. From Cause Number 11,306 of the United States Circuit Court of Appeals for the Fifth Circuit, which is a part of the record in this cause, there appear large parts of the record, identified in pages 1 to 6, inclusive, of volume one of the printed record, which have not been printed, and in Cause Number 11,905 of said court, which incorporates said cause Number 11,306, large parts of the record are eliminated, as reported on pages 1 to 3 of volume one of the printed record; and in addition thereto, in said Cause Number 11,306, original exhibits went up as identified in district court order appearing in volume three at page 1677 and in Cause Number 11,905 in order appearing in volume two at page 947. These parts of the record before said Circuit Court of Appeals are not before this Court.

(b) The petition does not conform to that part of said Rule 38 which requires that "the petition shall contain a summary and a short statement of the matter involved;" and the supporting brief is not direct and concise.

(c) The petition does not assign "special and important reasons" for writ of certiorari as required by Rule 38 (5).

(d) There is total absence of conflict of decisions of the Circuit Court of Appeals with decisions of other like courts and no important question of Federal Law is involved, and there is total absence of substantial Federal question or case of gravity and importance to justify granting petition.

> "The decree that was to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears by reference to our files that the application was opposed

by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and federal courts, or between those of federal courts of different circuits." *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U. S., p. 251, 36 S. Ct. 269, 60 L. Ed. 629.

2. The supporting brief does not conform to Rule 27 of this Court in that a concise statement of the grounds on which the jurisdiction of the court is invoked is not furnished and neither is there a concise statement of the case containing all that is material to the consideration of the awkwardly presented questions, and with no page references to the printed record.

II

Response Proper to Petition for Writ of Certiorari

"Jurisdiction"

Under this heading, it is claimed that the provisions of Section 240 of the Judicial Code as amended, Section 347 of Title 28, United States Code Annotated, Rule 38 of this Court and Rule 52 of District Court Rules of Civil Procedure, constitute basis for jurisdiction of this Court. Reference is also made to Section 407, Title 40, United States Code Annotated, and Section 67 (d) (6) of the Bankruptcy Act. There is nothing in the pleading or in the brief to cause any of these laws and rules to be invoked as basis for the claimed jurisdiction of this court.

"Case History"

The petition, under heading above, mixes law and facts and erroneously pictures the existing record of facts and the law applicable thereto.

The five volumes of printed record before this Court are made up of three volumes in said Cause Number 11,306 involving the bankruptcy, and of two volumes in said Cause Number 11,905; and the testimony in the bankruptcy case became part of the testimony in this cause on theory that the bankrupts were grantors, and the testimony supporting conclusion that the conveyances here involved were fraudulently made substantially influenced the rights of Mrs. John B. Edmonson. The three volumes of printed record in the bankruptcy cause were introduced as testimony in this cause, as well as all other testimony in the bankruptcy cause (R. 457). (In this pleading and brief the pages in said Cause Number 11,306 will be identified by letters B. R. for bankruptcy record, and in this cause proper by the letter R. for record.)

The bankrupts were interested with F. S. Glenn in building of military reservations and housing projects prior to March 1, 1943. Thereafter, F. S. Glenn withdrew from the business, and with approximately twenty-three government contracts scattered in six southern states, there was failure to meet payrolls by the bankrupts on October 16th, 1943 (B. R. 382). On November 3, 1943, the original petition in bankruptcy was filed, with two amendments to follow, and wherein there were involved the First and Second Acts of Bankruptcy (B. R. 8-21). On November 5, 1943, the Maryland Casualty Company filed suit to set aside the conveyances as fraudulent, and this suit was subsequently amended, and after the adjudication of the Newtons in bankruptcy the trustee in bankruptcy intervened as complainant for all creditors of the bankrupts on March 21, 1946. The trial of this cause resulted in judgment for Mrs. John B. Edmonson; but the trial court found facts which in themselves made it necessary for the court on appeal to find for the trustee in bankruptcy.

Three sources of facts appear in the record, namely:

1. The trial resulting in appointment of the temporary receiver making up volume one in said Cause Number 11,905, and

2. The trial of the bankruptcy cause bearing Number 11,306 in said Circuit Court of Appeals, and consisting of three printed volumes in addition to the index and substantial of testimony and original data not printed, and

3. The final trial of the pending cause on its merits by the trial court, including all of the testimony in the original receivership trial and all of the testimony in the bankruptcy trial, as well as a part of the testimony taken before the referee in bankruptcy since adjudication and reference.

From these three sources of fact, broadly speaking, the Circuit Court of Appeals found three fundamental reasons why the trustee in bankruptcy was entitled to prevail, they being:

1. That the deeds were without consideration and void because:

(a) The contracts between the Newtons and Edmonsons of 1942 recited paying of capital when no capital was furnished, and

(b) Same were merely promises to make gifts, and

(c) The Edmonsons did not and could not have any interest in the profits until realized and paid.

2. That the testimony was not sufficient to show that there were any profits under the 1942 contracts.

3. That said Mrs. Edmonson was a party to the fraudulent conduct of the Newtons, who conveyed all of their real property to her without her having paid any money therefor.

In the original receivership trial the trial judge appointed a temporary receiver, and in so doing recognized that if the Newtons were solvent, as they claimed, the conveyances here involved may be upheld, but in concluding in favor of having a temporary receiver the trial judge stated:

> "I have not overlooked the fact that the defendant may receive sufficient equity to take care of these contracts. If he does, the properties would go then to the people to whom he has conveyed them. On the other hand, if, as I believe from this testimony, he will not be able to recover a sufficient amount from these contracts to pay off his indebtedness, then it occurs to me that this conveyance of all property would have to be set aside." (R. 455.)

In the bankruptcy trial it developed that the Newtons owed more than three million dollars, and that the lands here involved constituted their real estate other than the homestead, and that they were hopelessly insolvent, and that the attorney representing the bankrupts also represented Mrs. John B. Edmonson (B. R. 765-6), and that the Newtons' books and records were out of balance more than one million dollars as to cash accounts alone (B. R. 1377), and that the Newton auditor had no knowledge of the faulty books which did not show $600,000.00 due subcontractors (B. R. 1377). There were many other developments, including the fact that there was in existence a Federal tax lien of $225,000.00. Based upon this record in three printed volumes, which said record is a part of the record in this cause as aforesaid, the trial judge, after relating the facts, concluded in part as follows:

> "Under this set of facts a Court can reach no other conclusion than that these conveyances were made at least to hinder and delay creditors in the collection of

their debts and the law thereupon presumes that they were fraudulent. . . .

"The law is that if the conveyances were made with the intent to hinder, delay or defraud creditors that the burden of proof is upon the defendants to show solvency if they rely upon solvency. They have failed to do this." (B. R. 1657.)

On appeal to the United States Circuit Court of Appeals for the Fifth Circuit, the court there upheld the trial court, and in so doing made reference to the various acts of bankruptcy which had been committed, and specifically the one dealing with the conveyance of property with intent to hinder, delay and defraud creditors, and thereupon, the court held that:

"The burden of proof was on the petitioning creditors; they met it by enough evidence of the insolvency of the defendants, of the appointment of a receiver to take charge of their property, and of transfers, conveyances, preferences, and concealments by them, to establish prima facie all the acts of bankruptcy charged in the amended and supplemental petitions." *Newton, et al.* v. *Glenn, et al.*, 149 Fed. 2d 879.

The Honorable T. J. Wills, then representing the Newtons in bankruptcy, and now representing Mrs. John B. Edmonson, filed with this court petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and said petition was denied on October 22, 1945. See *Newton, et al.* v. *Glenn, et al*, 326 U. S. 758, 66 S. Ct. 100, 90 L. Ed. 456.

The testimony in the final receivership hearing appears in Volume Two of said Cause Number 11,905. Mr. John B. Edmonson, husband of petitioner, testified that the Newton books "were in a mess," (R. 846), and that the Newton records were in bad condition and he "was disturbed about it," (R. 487), and that the Edmonsons did not know

whether Newton was solvent or insolvent, "I hadn't been able to find that out." (R. 492); but they took title to the property and permitted the Newtons to continue to collect rents thereon after the deeds were delivered and recorded. For the Edmonsons, Mrs. F. T. Newton testified that she was the sister of Mrs. Edmonson, and she admitted that the Edmonsons furnished no money to finance the project (R. 584). She admitted that the Newtons owned the Mississippi Electric Company, and that after default L. W. Totten was used as manager (R. 573), and that $30,000.00 of money was passed through the Honorable T. J. Wills, attorney for the Newtons and Edmonsons, for carrying on the Mississippi Electric Company after the inability of the Newtons to go forward in their own names (R. 573), and all the money was handled in cash (R. 574), and John B. Edmonson became assignee and had the business run in his name (R. 577).

There was an interesting sidelight in this trial, growing out of the fact that Reuben L. Newton, brother of F. T. Newton, took bonds of more than $40,000.00 and turned them over to Mrs. Newton and she carried these bonds to Washington in August of 1944, and gave the cash from the bonds to Reuben L. Newton, (R. 628); and at one time she testified that it was $20,000.00 of money, but when she was faced with the fact that the Treasury Department records showed she had gotten more than $38,000.00 the amount was increased in the testimony, and said Reuben L. Newton testified in his own behalf that the money was taken and buried in a jar on the lawn of his home (R. 645), and subsequently he took up the jar and put the jar with the money in it in a dirty clothes closet in his home in Jasper, Alabama, without his wife having knowledge thereof, and without his knowing how much money was in the jar or how full of money it might be (R. 679). Mrs. John B. Edmonson was only able to identify six pieces of property of the total

conveyed to her of value of $451,000.00 (R. 848). On trial before the referee, when Mrs. John B. Edmonson knew nothing, he cautioned her that she was answering "I don't know" to every question and that she ought to know something (R. 881). All of the testimony was conflicting and every witness for Mrs. Edmonson told a different story about every major fact when testifying a second time, or a third time, as in the case of Reuben L. Newton. This testimony, unworthy of belief, was the testimony before the Circuit Court of Appeals.

Under case history, petitioner refers to page 795 of the record, but this only shows the money passing into the hands of the Memphis Bank under the assignment, and it had nothing to do with the wide discrepancies brought about by waste on behalf of the Newtons and the Edmonsons, and it proved nothing as to the net profits on the three federal projects constituting basis for claim of Mrs. Edmonson.

In the history of the case, it should be mentioned that the Edmonsons knew nothing about any gains or losses under the contract, and they depended upon the so-called Wooten audit, and that audit on its face discloses that it was not intended to cover the economic status of the three contracts through which the Edmonsons want to claim as of August 15, when the audit was completed. In fact, the audit only covered down to the end of December 31, 1942 (R. 86). Because of this situation, the Circuit Court of Appeals had no basis for determining that the Newtons owed the Edmonsons anything under any circumstances.

"The Attack on the Property Transfer"

The petitioner is complaining of an interpretation given to Section 407, Title 40, United States Code, Annotated. In petition for certiorari in the bankruptcy cause aforesaid, the same attorney was calling for an interpretation of Sec-

tion 270 (a) and (b) of said Title 40, commonly known as the Miller Act. It is true that the Memphis Bank was assignee of a number of the contracts. It was not assignee against all of said contracts; but when the bank determined that the Newtons had failed to pay subcontractors with money he had obtained therefor to the extent of more than $600,000.00, and his books were behind for many months, as he admitted, and he was hopelessly involved, the bank was unwilling to make further advances; but this set of facts has nothing to do with the rights of the trustee as against Mrs. Edmonson, who obtained deeds to all of the Newton real estate at a time when they were insolvent and unable to pay their debts, and owing more than three million dollars, with the Edmonsons on notice of the precarious economic conditions of the Newtons.

"The title of Petitioner to the Property was attacked"

Petitioner correctly states that the trial court held that the price paid for the property was not its fair and equitable value. In fact, the court held that "In August, 1943, Newton's books and records were many months behind and were not properly posted, and he did not know financially just what his condition was". He represented to bank officials that he owed subcontractors approximately $140,000.00, but it developed that he owed more than $600,000.00 to subcontractors, and he was insolvent (R. 922). The court further held that these three contracts through which the Edmonsons claimed were approximately ninety-five per cent complete on August 23, 1943, when the three deeds were executed (R. 922). The trial court in supplemental finding of facts held that "At the time of the execution and delivery of the three deeds and the assignment, aforesaid, no money or property was delivered to the grantors and assignor for the three deeds"; and the court further held that

after the execution and delivery of the three deeds and the assignment "The grantors retained benefits flowing from the property in that they gave no notice of the conveyances or assignment and continued to collect rents and retain same until the default of the Newtons on October 16, 1943." (R. 932).

With this kind of record, the opposition is contending that there has been a failure to apply Section 67 (d) (6) of the Bankruptcy Act, and that the Circuit Court of Appeals has been unwilling to give effect to Rule 52 of United States District Court Rules of Civil Procedure. We, of course, contend that there has been no violation of any law, rule or regulation, and that said Circuit Court of Appeals had no election but to render the opinion against which petition for certiorari to this Court has been filed.

III

Argument for Respondent

The brief for petitioner correctly represents that there was a contract between F. T. Newton on one side and Mr. and Mrs. John B. Edmonson and others on the other, dated April 6, 1942, (R. 216), but there is a failure to recognize that the partnership of Newton and Glenn consisted of F. T. Newton, Mrs. F. T. Newton and F. S. Glenn, and such was the conclusion in the bankruptcy trial, and Newton was in no position to contract away two-thirds of the partnership business to members of his family and his wife's family, in spite of the fact that the trial judge held that he did make the contract and that at the time he had a right so to do to avoid income taxes, the trial judge stating in his opinion that "These subcontracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted." (R. 925). As the Circuit Court of appeals held, these so-called subpart-

nership contracts were without consideration and void; and the court also recognized that there was no proof to show profits on the particular contracts, because, as pointed out in statement of facts hereto, the audit of R. G. Wooten only covered to the end of 1942, and these contracts were only ninety-five per cent completed on August 15, 1943, when said audit was dated. The discussion about subpartnership rights, therefore, has no place in this consideration, because of absence of proof to support same. If the opposition could prevail, there would be a loss to creditors of property valued by the bankrupts at $451,000.00 as set forth in financial statement (R. 750), and which property was listed in financial statement to the Memphis Bank and others to obtain credit (B. R. 203-773). Then auditor Paul Mote, for the Maryland Casualty Company and the National Surety Corporation, initiating this suit, estimated in 1943 that the Newtons were insolvent to the extent of two million dollars (R. 138); but in this he was mistaken, because there are claims probated in bankruptcy of $2,387,491.32 (R. 821-3); and at the time of the trial of this cause the trustee held for the benefit of creditors less than $50,000.00, and the outstanding and the only property of value to pay these claims is the real estate involved in this cause, which the Newtons deeded to Mrs. Edmonson, sister and sister-in-law of the bankrupts, at a time when the Newtons and the Edmonsons knew that this included all the real property they owned. Mrs. Edmonson testified that she was very close to her sister (R. 834), that she put no money in the contracts constituting the basis for her claim (R. 836), that when she received the deeds here involved there was no passing of money or property (R. 837), that she contributed no money or property towards the three government contracts (R. 838), that she knew nothing about the profits and losses (R. 842), that the revenue from the property included in the

deeds was $5,000.00 per month (R. 857), and that she knew of no other property owned by the bankrupts and not covered by deeds (R. 862). In this case, Mrs. John B. Edmonson put nothing into the three contracts involved, and she paid nothing for the real estate identified in the deeds. Judge Cordozo when Chief Justice of the Supreme Court of the State of New York, in speaking of a situation where the facts were not as strong against the party as against petitioner here, said:

> ". . . A case may be supposed where a special partner receives in cash his capital contribution, the general partners retaining property sufficient at a fair valuation to pay the debts in full, but the next day or the next hour the property is destroyed by earthquake, flood, or fire. The conclusion is hardly thinkable that the special partner may keep the cash, and leave the creditors with nothing. His contribution, like the capital of a corporation, and to a similar extent, is to be treated as a trust fund for the discharge of liabilities." *Kittredge v. Langley, (N. Y.)*, 169 N. E. 626, 67 A. L. R. 1087.

Section 407, Title 40, United States Code Annotated

The opposition mentions the law above identified, which became effective on June 16th, 1933. However, this act related to the Federal Emergency of 1933, and the projects here involved were let by the United States to the bankrupt contractors after 1940 and admittedly were a part of the national defense program. We, therefore, are at a loss to understand why petitioner and her counsel inject into the discussion the Act of 1933 dealing with the depression and the assignments permissible under that Act. The assignment of Claims Act appearing as paragraph 203, Title 31, United States Code Annotated was the basis and controlling law for the assignments here involved (B. R. 314).

This Assignment of Claims Act of 1940 has been construed by the courts, including the Circuit Court of Appeals for the Fifth Circuit, and this court.

> "In addition to protecting the Government, which was the prime purpose of the section before its amendment, as construed in Martin *v.* National Surety Co., 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822, the amendment of 1940 had the incidental effect of protecting that assignee who filed his assignment and gave notice under the provisions of the statute." *Coconut Grove Exchange Bank* v. *New Amsterdam Casualty Company,* 149 Fed. 2d. 73 (May 17, 1945, 5C).

It is agreed that the Government contracts of the bankrupts were covered by performance and payment bonds required under paragraphs 270 (a) and (b), Title 40, United States Code Annotated; but this act has no application here. We are only dealing with a suit involving fraudulent conveyances made by the bankrupts to a sister of one of them. Petitioner is now claiming before this Court that even though the Memphis Bank was due more than $1,500,000.00, and even though the contractor had received monies to pay subcontractors and had failed to use this money to the extent of $600,000.00, and even though the real estate valued by the bankrupts at $451,000.00 on financial statement had been secretly conveyed away, still it was the duty and obligation of the bank to continue to advance money to the bankrupts for the carrying on of their work. Such is not the law, and could not be the interpretation of either of the Federal statutes identified; but if this were the law, it has nothing whatsoever to do with the rights of creditors with claims of more than $2,387,000.00 remaining unpaid, and with no hope to get any payment whatsoever unless the real estate listed on financial statements at $451,000.00 is made available to them through the trustee in bankruptcy.

Application of Section 67 (d) (6) of the Bankruptcy Act

Petitioner contends that the Circuit Court of Appeals was in error in holding that this act had no application to a case of this kind. In this we are convinced that the Circuit Court of Appeals was correct, but no different result could have been reached had this act been applicable and applied, because it was not intended under that law to make it possible for persons to give away their property to members of their family while insolvent. The bankruptcy cause has already been before this Court on petition for writ of certiorari, and the petition was denied. It was held in that cause that the bankrupts executed these deeds to Mrs. John B. Edmonson with the intent to hinder, delay and defraud their creditors. Under the existing facts, even if said Mrs. Edmonson had a claim and proved it, which she did not, still she could not prevail under the Federal Act on the theory that she was a purchaser in good faith for a present, fair equivalent value. As pointed out above, she paid nothing to become a party to the 1942 contracts with Newton and Glenn, and she paid nothing when she obtained the deeds, and she knew at the very time, as did her husband, that the books of the bankrupts were in a mess (R. 486), and that they could not tell the status of the bankrupts from the records (R. 488).

Application of Civil Rule 52 of United States District Courts

Petitioner contends that the Circuit Court of Appeals set aside the finding of facts made by the district court, and violated said Rule 52. The record disclosed that the United States Circuit Court of Appeals reached its conclusion on facts not found by the district judge. The district judge did not recognize that the Edmonsons failed to prove that

anything was due them even if the 1942 contracts between Newton and Glenn on the one side and the Edmonsons on the other were enforceable. The Circuit Court of Appeals took the position that the testimony was wholly insufficient to support a definite finding of an indebtedness due by the Newtons to the Edmonsons. In addition thereto, the Circuit Court of Appeals recognized, as contended for the trustee, that these conveyances were fraudulent and void under the existing law.

> "This court always proceeds slowly in reversing a chancellor on the facts. But the Constitution invests us with appellate equity jurisdiction, and, in reviewing this record, we do so as chancellors, charged with the solemn duty of requiring the proof to measure up to legal standards. If, according to our view of the facts and the promptings of our conscience, the learned chancellor was manifestly wrong, then it becomes our plain duty to set aside the decree of the court below and apply the legal test as we see it." *Gillis* v. *Smith,* 114 Miss. 665, 75 So. 451.
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> "The true rule in this respect is set forth in Keller *v.* Potomac Company, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731: '* * * In that procedure (in equity), an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses.'
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> "In recognition of this rule, the court in the *Hoeltke* case, *supra,* used the following language: 'We are thoroughly familiar with the salutary rule that in equity cases the findings of the District Judge on questions of fact will not be disturbed unless in our opinion such findings are clearly wrong.' See also Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c." *Edwards* v. *Lain,* 7 Cir., 112 Fed. 2d. 343.

Affirmative Statement for Trustee

We agree with the Circuit Court of Appeals that Section 67 (d) (6) of the Bankruptcy Act has no application, but if applied, the burden rests on Mrs. John B. Edmonson to prove that she was a purchaser in good faith and for a present, fair, equivalent value. Said Mrs. Edmonson did not present any testimony whatsoever. All of her testimony was that produced by the trustee in bankruptcy. She did not appear at the trial and furnish any testimony whatsoever for herself. It was the duty of Mrs. Edmonson to affirmatively plead as well as prove that she came within the exception under said paragraph 67 (d) (6) of the Bankruptcy Act. No such pleading was filed for her. See *Hummel* v. *Wells Petroleum Company,* 111 Fed. 2d. 883 (C. C. A.). This affirmative pleading also required the affirmative proof, which she did not furnish, as indicated above.

> "The burden was on the appellant, if it would save the transaction under said Section 67 (e), to prove that it was a purchaser in good faith and for a present fair consideration. * * * Appellant has failed to meet this burden." *Edward Hines Western Pine Co.* v. *First National Bank,* 61 Fed. 2d 503, (CCA Ill.).

The presumption is against petitioner, since there are involved members of her family.

> "The decision of this court in the Prosser case above cited is peculiarly applicable, in that it involved, as here, transactions between an insolvent debtor and members of his family, which are presumptively fraudulent, and call for full explanation on the part of the beneficiaries." *Bailey* v. *Blackmon,* (C. C. A. 4th), 3 Fed. 2d 252.

The Bankruptcy Act contemplates equality of distribution to all, other than fraudulent transferees.

"But in this case there was a fraudulent transfer. The saving clause in 13 Eliz. which protected innocent purchasers for value was not broad enough to protect mere unsecured creditors of the fraudulent transferee. . . . Furthermore respondent had at least some knowledge as to the fraudulent character of Downey's corporation . . . And title to the property fraudulently conveyed has vested in the bankruptcy trustee of the grantor. We have not been referred to any state law or any equitable considerations which under these circumstances would accord respondent the priority which it seeks." *Sampsell* v. *Imperial Paper & C. Corp.*, 313 U. S. 215, 85 L. Ed. 1293.

Statutory and Common Law in Mississippi Required Result Reached by Circuit Court of Appeals

The trial judge held in the original receivership hearing that the conveyances and assignment would probably have to be set aside, and a receiver was named; and in the bankruptcy hearing against the Newtons, which is a part of this record, it was held that said conveyances and assignment were made to Mrs. Edmonson to hinder, delay and defraud creditors of the Newtons. We have heretofore pointed out that she did not testify in her own behalf in the final hearing, and that she and Mrs. Newton, one of the bankrupts, were sisters and very close together, and that she put no money into the jobs from which she now expects proceeds, and that the deeds and assignment were received by her without her paying anything therefore. She further testified in another hearing that she contributed no money or property towards the three government contracts (R. 838), and as above stated, she knew nothing about the profits and losses. She did not know what she obtained through the deeds and she could identify only six pieces of property of the great number of units involved (R. 848-9). Her memory was convenient, as was her knowledge of the facts. She claimed that she could not

remember any stable facts (R. 865), and it was a common answer that she did not know (R. 869); and when the deeds were executed they were placed in safe of the bankrupts (R. 870). She did not know when the deeds were recorded or who put on the revenue stamps required by the Federal Law (R. 871). She claimed that Mr. Wills, who represented the bankrupts, and who represents her here, cared for that (R. 874), and she admitted that all of the transactions were in cash (R. 876), and although she received $5,000.00 per month as rents, no deposits were made in the banks (R. 879); and she did not know how much money she received (R. 871). She claimed that the rent money was placed in a safe deposit box (R. 873), but when the box was examined it was empty (R. 896). This was the kind of testimony which was furnished by and for Mrs. Edmonson.

> "We concur in the views announced by those courts which hold that proof of fraud on the part of the grantor is sufficient to entitle his creditors to subject the property fraudulently assigned, in the absence of evidence showing the claimant to be a purchaser for value and in good faith. We fail to perceive why, in cases of this character, the party assailing the conveyance shall be required to assume the burden of showing participation in the fraud by the purchaser, and the nonpayment of value for the property fraudulently conveyed." *Richards* v. *Vaccaro*, 67 Miss. 516, 7 So. 516.
>
> "A debtor being unable to pay a debt when called upon by the creditor, a presumption arises that he could not have done so at any previous time, and any intervening conveyances of property is considered fraudulent and void, and it is incumbent on the party holding such property, and insisting upon such claim, to show that such debtor, at the time of conveyance, retained other specific property, readily accessible, and ample for the discharge of all his debts, and this burden has not been met in this case." *Ames* v. *Dorroh*, 76 Miss. 187.

The Circuit Court of Appeals must have been challenged substantially by the existing badges of fraud, which must be considered together and not separately.

> "On the issue as to whether there was a *bona fide* sale from Jos. V. Lavecchia to his sister-in-law, the following well-known labels and badges of fraud are disclosed by the evidence; Inadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempt to give evidence of fairness by conscripting sister-in-law as a conduit for passing title to the wife, retention of possession, failure to take a loss of the property covered by the conveyance which was commingled with some furniture and fixtures belonging to his father's estate, relationship of the parties, and transfer to person having no apparent use for the property." *Reed* v. *Lavecchia, et al.*, 193 So. 439, 187 Miss. 413.

It should be pointed out that the contracts of 1942, which constitute the basis for Mrs. Edmonson's claim, identify her and other members of the Newton family as "silent partners" (R. 216-19), and that the three deeds had recited consideration therin of $10.00, with the two F. T. Newton deeds covering identical properties, and revenue stamps on each of $11.00 (R. 114-125), and the deed of Mrs. Newton to her sister had the $10.00 consideration, with $9.90 of revenue stamps (R. 131). The consideration, according to the revenue stamps, amounted to around $27,000.00, but covered property valued by the district judge at $451,000.00 (R. 894). The deeds are dated August 23 and the assignment September 22, 1943, and same were filed for record on October 6, 1943. The transfers covered all of the real estate of the Newtons excepting the homestead. The Newtons retained possession until October 16, 1943, being the time when they defaulted with the Government, and the trial judge gave a special finding of fact that the grantors

"retained benefits flowing from the property in that they gave no notice of the conveyances or assignment and continued to collect rents and retain same until the default of the Newtons on October 16th, 1943." (R. 932). This court has recognized the principle that the law will not permit a debtor to sell his land and reserve secret benefits after delivery of deed, and in an old case two Mississippi cases were quoted by the Supreme Court of the United States, with approval in this regard. This, in itself, required the Circuit Court of Appeals to reach the conclusion now complained of.

> "The law will not permit a debtor, in failing circumstances, to sell his land, convey it by deed, without reservations, and yet secretly reserve to himself the right to possess and occupy it for a limited time, for his own benefit. Wooten *v.* Clark, 23 Miss. 75; Arthur *v.* Com. & R. R. Bk., 8 Sm. & M. 394; Towle *v.* Hoit, 14 N. H., 61; Paul *v.* Crooker, 8 N. H. 288; Smith *v.* Lowell, 6 N. H., 67. Such a transfer may be upon a valuable consideration, but it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it, inconsistent with its terms, securing a benefit to the grantor, at the expense of those he owes. A trust, thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right—the right of possession—and gives to the debtor the beneficial enjoyment of what rightfully belong to his creditors." *Lukins v. Aird*, 18 Law Ed., 750. See also Dent *v.* Ferguson, 33 Law Ed., 242.

There are many other badges of fraud found through the record, including inadequacy of consideration, and alterations appearing on the deeds, and failure of Mrs. Edmonson to pay taxes on the property after she received the deeds, and the fact that the Newtons took all of their Government bonds and placed them with Reuben L. Newton, brother of

F. T. Newton, with result that he finally claimed that he had Mrs. Newton, one of the bankrupts, to cash the bonds and give him the money, which he buried in a jar on the lawn of his home in Jasper, Alabama. These facts do not add up to good faith or present consideration. Under these facts, the Edmonsons cannot now claim to this court that on the equity side of the docket of the United States District Court they had shown any equity on their side. It is a case where the Newtons and the Edmonsons, as very close families, tried to figure out a way to place property beyond the reach of creditors and to make it impossible for creditors to recoup the relatively small amount of property compared with the debts.

We have here first contended that no binding partnership agreement existed between the Edmonsons and the Newtons, and that the Edmonsons were entitled to no economic benefits therefrom. Our second contention is that the existing facts, including the adjudication of the Newtons as bankrupts, and the method of handling the deeds and the assignment, and the relationship of the parties, and other existing facts identified in this argument, require the conclusion that the conveyances were fraudulent and void and properly set aside by the Circuit Court of Appeals. Our third contention has been that, under the Mississippi and common law, the deeds and assignment were and are fraudulent conveyances, without consideration and void. The trial court found as a fact that the consideration for the deeds under the contentions of the Edmonsons was inadequate. He also found as a fact that after the delivery of the deeds and assignment the Newtons, as grantors, continued to collect rents at the rate of $5,000.00 per month, and continued to exercise control over the property conveyed until October 15th, 1943, when the Newtons defaulted on their twenty-three existing Government contracts. If the opinion of the United States Circuit Court of Appeals is upset, the Edmon-

sons and Newtons will continue to own the real estate valued by the trial judge at $451,000.00, and creditors with probated claims aggregating more than $2,000,000.00 will get absolutely nothing. This cause arose in a court of equity. On equitable principles, as well as on legal principles, the Circuit Court of Appeals had no election but to do what it did.

Conclusion

The Circuit Court of Appeals has committed no error. Said court has not decided "an important question of local law in a way probably in conflict with applicable local decisions;" and it has not decided "an important question of Federal law which has not been, but should be settled by this court." We submit that the petition for writ of certiorari is not well taken and should be denied.

Respectfully submitted,

T. C. HANNAH,
Hattiesburg, Mississippi;
M. M. ROBERTS,
Hattiesburg, Mississippi,
Of Attorneys for Respondent.

The undersigned T. J. Wills, attorney for petitioner, acknowledges receipt of copy of brief of respondent on this the 11th day of September, A. D., 1947.

T. J. WILLS,
Hattiesburg, Mississippi.